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May 19, 2015

Via ECF (S.D.N.Y. and C.D. Cal.) and Email (D. Kan.)

The Honorable Denise L. Cote
United States District Court for the Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007

The Honorable John W. Lungstrum
The Honorable James P. O'Hara
United States District Court for the District of Kansas
500 State Avenue, Suite 517
Kansas City, KS 66101

The Honorable George H. Wu
United States District Court for the Central District of California
312 North Spring Street
Los Angeles, CA 90012-4701

Re: *NCUA v. RBS Securities, Inc.*, No. 13-6726 (S.D.N.Y.)
NCUA v. RBS Securities, Inc., No. 11-5887 (C.D. Cal.)
NCUA v. RBS Securities, Inc., No. 11-2649 (D. Kan.)
NCUA v. Morgan Stanley & Co., No. 13-6705 (S.D.N.Y.) (Lead Case)

Dear Judges Cote, Lungstrum, Wu, and O'Hara:

We write on behalf of NCUA, as liquidating agent for several failed credit unions, to provide notice of a subpoena-related discovery dispute pending in the Northern District of Illinois, which concerns the Master Discovery Protocol ("MDP") adopted in these Actions.

On April 14, 2015, NCUA issued a subpoena commanding James Whittemore, a former RBS credit officer, to appear for a deposition on May 12, 2015 in Chicago, Illinois. Whittemore has been deposed several times in other RMBS actions, and RBS has produced the transcripts of that testimony to NCUA under MDP § 10(d). Citing the language in MDP § 10(d) that "parties shall endeavor to not subject witnesses to the same questioning for which a transcript was previously provided," Whittemore's personal counsel requested that NCUA agree (1) to limit the deposition to fewer than seven hours, and (2) to provide Whittemore with the topics that would be covered at the deposition ahead of time. NCUA declined Whittemore's request. *See* Ex. 1, Klenov Email to Crowell.

On May 11, Whittemore filed a motion to quash, or, in the alternative, for a protective order, in the Northern District of Illinois. *See* Ex. 2. Relying on MDP § 10(d), Whittemore argues (*id.* at ¶ 5) that "NCUA has no need for further testimony" in light of his prior depositions in unrelated cases, or (*id.* at ¶ 8) that the court should preemptively prohibit NCUA from asking questions about topics covered in these prior depositions. Whittemore's motion is currently pending before Magistrate Judge Michael T. Mason (15-cv-04152).

Upon being served with Whittemore's motion, NCUA immediately forwarded the recent coordinated discovery ruling concerning Goldman Sachs's misuse of MDP § 10(d), wherein the Courts held that the "endeavor" language in § 10(d) is not "a limitation ordered by the court," and it thus cannot be used to instruct a witness not to answer NCUA's deposition questions. ECF No. 290 (13-cv-06705). Because that ruling contradicted Whittemore's assertion that MDP § 10(d) can be used to prevent a witness from answering deposition questions, NCUA asked Whittemore's counsel to either dismiss the pending motion to quash as moot, or consent to transfer the discovery dispute under Rule 45(f) to the Southern District of New York. Whittemore's counsel, who is based in New York, declined both requests. *See* Ex. 3, Crowell Email to Klenov.

Earlier today, NCUA filed an emergency motion under Rule 45(f) to transfer that subpoena-related discovery dispute from the Northern District of Illinois to the Southern District of New York. *See* Ex. 4. As the Advisory Committee notes on Rule 45(f) explain, "transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts."

NCUA believes that any discovery dispute concerning the MDP adopted in these Actions, particularly one that relates to a discovery ruling that the Courts have already issued, should be resolved by the Courts presiding over these Actions in accordance with the procedures in MDP § 2. By asking another district court to adopt a conflicting (and erroneous) interpretation of MDP § 10(d), Whittemore seeks to directly undermine the MDP's goal of efficiency, consistency, and conservation of judicial resources. If the dozens of former bank employees who NCUA seeks to depose file similar motions in their home districts, NCUA's coordinated Actions will grind to a halt.

A transfer to the Southern District of New York under Rule 45(f) is essential to obtaining a uniform interpretation of MDP § 10(d) that will prevent such unnecessary and inefficient disruptions.

Because the discovery dispute pending in the Northern District of Illinois concerns the MDP and may result in discovery rulings that are inconsistent with those issued by the Courts, NCUA is providing the Courts with notice.

Respectfully submitted,

/s/ Stephen M. Tillery

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